Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-22
Market Entry and Regulation	)	RM-8355
of Foreign-affiliated Entities	)	RM-8392
	)	

REPLY COMMENTS OF SPRINT

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SUMMARY

Despite widespread support of the Commission's ultimate policy goals, the proposed EMA test has been challenged by a number of parties, including the U.S. and three foreign governments, on both legal and policy grounds:

- Foreign trade issues are outside the FCC's jurisdiction, and the EMA test could conflict with Executive Branch commitments to multilateral negotiations.
- Reciprocity was not intended to be considered in Section 214 proceedings, and that section cannot be applied when less-than-controlling investments are involved.
- Foreign ownership interests in excess of Section 310(b)(4) benchmarks should be routinely allowed.
- Foreign governments perceive the EMA test as a closing of the U.S. market, and its adoption could provoke retrenchment and retaliation.
- The EMA test is too uncertain to succeed in causing a foreign country to open its market, particularly where a foreign carrier is merely seeking to make a non-controlling investment in a U.S. carrier.
- Possible discriminatory actions favoring particular U.S. carriers should be the subject of industry-wide rules, rather than controlled through an EMA test.

The principal support for the EMA test comes from AT&T and BT/MCI -- the two major participants in the market for seamless global services today. However, these parties fail to establish a statutory basis for the EMA test and offer no reason to believe that the test would in fact succeed in opening up foreign markets. Of course, they may be perfectly content if it does not do so -- it would simply give them

[redacted]

market while denying to other U.S. carriers the foreign capital that would be enable them to compete more effectively at home and abroad. Thus, despite the Commission's best intentions, the end result of the EMA test might well be to insulate AT&T and BT/MCI from further competition domestically and in the rapidly developing global market.

Iain Vallance, Chairman of BT, was recently quoted as saying:

> The game is how you develop your pieces around the world. For once the squares are taken by rivals, your options are constrained.

The Commission should be wary of taking steps that however well-intentioned, have the effect of allowing AT&T and BT to fill up the game board between themselves before any other U.S. carrier has a chance to play.

Finally, the Commission should refrain from codifying its existing policies on international private line interconnection until it re-examines those policies in light of Execunet to make sure the Commission is not attempting to use Section 214 impermissibly to control service offerings of U.S. carriers, and it should formulate proposed rules and give parties an opportunity to comment on those rules before they are finalized.

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Sprint Communications Co. hereby responds to the comments of other parties on the Commission's proposals to govern the participation of foreign carriers in the U.S. telecommunications market.

I. INTRODUCTION

In its NPRM,[1] the Commission enunciated broad goals of promoting effective competition in the global market, preventing anti-competitive conduct in the provision of international services or facilities, and encouraging foreign governments to open their communications markets. As a means of fostering the latter two goals, the Commission proposed an "effective market access" ("EMA") test, to be applied principally to international facilities-based common carriers.[2] The

[1] FCC 95-53, released February 17, 1995.

[2] Several comments are limited to consideration of whether the EMA test should apply to non-common-carrier services, such as broadcasting and aeronautical enroute and fixed services, and specialized satellite services. Since these services are peripheral to Commission's principal focus and Sprint's

EMA test is essentially a reciprocity test: in reviewing entry or investment in the U.S. market by a foreign carrier, the Commission would consider whether there are effective opportunities for U.S. carriers to participate in the primary international telecommunications markets served by the foreign carrier in question. The EMA test would be only one factor considered in the public interest in Section 214 proceedings (and, where radio licenses are involved, in Section 310(b) proceedings), and the Commission would reserve the right to deny a particular application even where the EMA test has been fully satisfied or to approve an application even where there is no opportunity for entry by U.S. carriers in the foreign market.

There is broad support among the commenting parties for the Commission's policy goals. However, as will be discussed below, the comments reveal (1) serious concerns that the Commission may be overstepping its bounds, because it would encroach into the Executive Branch's responsibilities for foreign trade matters, and because the Communications Act does not permit it to apply the EMA test in the fashion it has proposed; (2) substantial reason to believe that the EMA test would be ineffective in achieving the underlying policy objectives; and (3) a very real possibility that the EMA test would

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principal interest, Sprint will not address those comments in this reply.

provoke retrenchment or retaliatory actions by foreign governments, while denying to U.S. consumers the prospect of additional or strengthened competition at home. It is particularly noteworthy that every government that has commented on the Commission's proposal -- including the U.S. government -- expresses reservations as to the course of action the Commission has proposed.[3]

The principal supporters of the Commission's EMA test are AT&T (whose relationships with foreign carriers would be left untouched under the Commission's proposals) and the BT/MCI alliance (whose relationships have already been approved by the Commission under a different, more relaxed test[4]).[5] This

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[3] Comments were filed by the British Government, the French Directorate General for Posts and Telecommunications (DGPT), the Secretary of Communications and Transportation of Mexico ("Mexico"), and NTIA on behalf of the Executive Branch (including the Departments of Commerce, Defense, Justice, State, and Treasury and the Office of United States Trade Representative).

[4] The focus of the EMA test is whether the foreign country permits competition by U.S. carriers in facilities-based international services. The U.K. has not yet permitted such competition.

[5] These parties lend no meaningful support to the EMA test. They ignore the legal infirmities in the Commission's proposals and fail to offer any reason to believe that the EMA test would be likely to succeed in opening foreign markets that otherwise would remain closed. Instead, they largely parrot the NPRM, or repeat arguments they have previously advanced to the Commission. (AT&T in particular, raises the same, and often far-fetched, hypotheticals of foreign discrimination that it advanced, and to which Sprint fully responded, in connection with Sprint's pending request for a declaratory ruling in File No. ISP-95-002. See, Sprint's Reply dated December 5, 1994, which Sprint hereby incorporates by reference. Since AT&T offers nothing new in that regard,

fact alone should give the Commission pause to consider the possibility that, despite its best intentions, the end result of its proposals might well be to insulate AT&T and the BT/MCI combination from effective competition both in the domestic U.S. market and in the market for seamless global services and to deny or delay foreign investment in smaller U.S. international carriers.

Domestically, the creation of new obstacles to investment in the U.S. will inhibit competition and slow the growth of competitors of AT&T and MCI. Internationally, the market for seamless global services is developing now. Iain Vallance, Chairman of BT, recently was quoted as observing:[6]

> The game is how you develop your pieces around the world. For once the squares are taken by rivals, your options are constrained.

AT&T and BT are scrambling to fill up the "squares" in what, according to Business Week, "looks to be a two-carrier race" (id. at 176). The Commission should be wary of taking steps that, however well-intentioned, have the effect of allowing

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and because Sprint advocates across-the-board rules to guard against discriminatory actions by foreign carriers, it is unnecessary to belabor the record in this proceeding with a repetition of Sprint's response to AT&T's repetition of its earlier arguments.)

[6] "Who'll Be The First Global Phone Company? Contenders AT&T and British Telecom are slugging it out for all they're worth," Business Week, March 27, 1995, 176, 177.

AT&T and BT to divide the game board between themselves before any other U.S. carrier has a chance to play.

Because of the legal and policy issues raised against the EMA test as a device for opening foreign markets, because of the risk to competition in the U.S., and because there is a superior way -- rules that apply to all U.S. carriers -- of guarding against discrimination, the Commission should abandon the EMA test.

II. SERIOUS LEGAL ISSUES HAVE BEEN RAISED WITH RESPECT TO THE COMMISSION'S PROPOSED EMA TEST

The comments challenge virtually every aspect of the Commission's authority to implement the EMA test, including its jurisdiction in international trade matters, its implicit assertion of authority to use Section 214 to review less-than-controlling investments by foreign carriers in U.S. carriers, and its practice under Section 310(b) of the Act.

NTIA (at 4-12) and others[7] point out that the separation of powers provisions of the Constitution assign authority over international trade matters to the Executive Branch of the government.[8] In that regard, NTIA reminds the Commission (at 10-11) that in exercising its responsibilities with respect to

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[7] See, e.g., Deutsche Telekom at 14-22 and Telefonica Larga Distancia ("TLD") at 5-13.

[8] It is also noted that in recent years, Congress has twice considered and rejected giving the Commission an explicit role in trade issues, in the Telecommunications Trade Act of 1988 (see, Deutsche Telekom at 19-22) and the Fair Trade In Services Act of 1993 (see, TLD at 13).

matters involving foreign telecommunications carriers, "the Commission's authority overlaps with the more extensive and primary responsibilities of the Executive Branch" and that the Commission must exercise its authority "with great deference" to the Executive Branch and "in a manner consistent with U.S. international legal obligations...."

These parties also observe (id.) that the Executive Branch is now pursuing a multilateral approach, in negotiations scheduled to last through April 30, 1996, to opening telecommunications markets, through the Negotiating Group on Basic Telecommunications ("NGBT"), which was created by the World Trade Organization ("WTO") within the framework of the General Agreement on Trade in Services ("GATS"). As part of this multilateral process, the GATS signatories, including the United States, have committed to a standstill provision that precludes any country from taking any measure in the meantime that would improve its negotiating position or leverage.[9] Adoption of the EMA test would violate this commitment or at the very least appear to others to violate this commitment and thereby undermine the NGBT negotiations. NTIA (at 7) stresses the Administration's desire to take the "broadest possible approach" to telecommunications trade issues through the NGBT negotiating process, quoting Vice President Gore, in his address to the G-7 Ministerial Conference earlier this year,

[9] See, Deutsche Telekom at 17-18 and TLD at 22-23.

as stating: "Let us resolve to meet this [April 1996] deadline to remove our investment barriers together.[10]

The British Government (at ¶14) argues that the goal of opening foreign markets should be achieved through negotiations in multilateral fora such as the World Trade Organization, rather than introducing reciprocity tests in regulatory regimes, and points to the commitment of the G-7 ministers to the WTO negotiations on telecommunications. It states (¶17) that the Commission's proposed EMA test is "difficult to reconcile" with the concept of national treatment under the WTO agreement and emphasizes that the negotiating countries should "not lock themselves in, or encourage other participants to do so, to a rigid bilateral reciprocity approach." The French DGPT also urges (at 2) use of a multilateral process (such as the WTO). Even BT North America, Inc. ("BTNA") concedes (n.5 at 4) that the Commission's approach raises an issue of consistency with the multilateral focus of the GATS in which other U.S. government agencies and other governments are presently involved. Professor Aronson, while supporting the concept of clear guidelines, cautions against impeding the Executive Branch's efforts to achieve multilateral breakthroughs, and suggests

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[10] Emphasis supplied. AT&T, which quotes from the same address (at 2), neglected to include the Vice President's commitment to this multilateral process. Nowhere did the Vice President suggest that now is the time to close the U.S. market in order to obtain leverage over foreign countries.

that Commission guidelines should be a fall-back position to be employed only if multilateral talks fail.[11]

Apart from the current multilateral negotiations, the Executive Branch also has explicit authority to conduct bilateral market-opening telecommunications trade negotiations. But whether for multilateral or bilateral negotiations, the trade statutes provide both general and specific negotiating objectives (see Section 1375 of the 1988 Trade Act, 19 U.S.C. §3104) and an enforcement mechanism for all telecom trade agreements (Section 1377, codified at 19 U.S.C. §3106) that has demonstrated effectiveness. Moreover, the Executive Branch also already has at its disposal the power to deny FCC authorizations as a retaliatory measure under the trade laws (Section 301(c)(2)(A) of the Trade Act of 1974, as amended, 19 U.S.C §2411(c)(2)(A)). There is simply no need to complicate further the Executive Branch's task or add to Congress's instructions with respect to telecommunications trade negotiations.

Quite apart from the primacy of the Executive Branch in trade matters, and the inconsistency between the Commission's proposed bilateral, reciprocity approach and the multi-

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[11] Comments of Professor Jonathan D. Aronson at 2. Of course, because circumstances vary so widely in different countries and different transactions, it is impossible as a practical matter to promulgate the "clear" guidelines Professor Aronson desires. The Commission recognized that difficulty in determining to apply the EMA test on a case-by-case basis.

national negotiations that are currently in process, issues have been raised as to whether the Communications Act gives the Commission the authority it has tentatively asserted for itself in the NPRM. Deutsche Telekom quotes previous Commission holdings that even the broad mandate in Section 1 of the Act over "interstate and foreign communications" does not confer "any responsibility for investment policy with respect to communications systems in foreign countries" and that "a desire for reciprocity in international investment policies [does not] by itself provide[] an adequate basis for action on our part."[12] NTIA similarly asserts (at 14, footnote omitted) that the proposed EMA test "implicates issues broader than those committed to the Commission under the Communications Act... ."

The specific procedural vehicles the Commission proposes to utilize for applying its EMA test have also come under fire. In the NPRM, the Commission proposed to rely primarily on Section 214. However, several parties have pointed out that this section is directed at avoiding unnecessary duplication of facilities and, at most, could give the Commission jurisdiction only over direct entry by a foreign carrier or acquisition of control of a U.S. carrier holding Section 214

[12] Deutsche Telekom at 11, quoting from Second Cable Foreign Ownership Order, 77 FCC 2d 73, 78-79 (1980).

authorizations by a foreign carrier.[13] Indeed, it is argued that even where there is entry or acquisition of control, the fact that the statute gives the Commission authority to take reciprocity considerations into account in other contexts, but not in Section 214, indicates that Congress did not intend the Commission to have the power to consider reciprocity in the context of Section 214 applications.[14]

In the NPRM, the Commission did not explicitly propose to require advance approval of non-controlling investments by foreign carriers. However, it did make a veiled threat (in ¶51) that unless the parties to such a transaction voluntarily sought a declaratory ruling in advance of the investment, the Commission might "designate[]" the U.S. carrier's Section 214 certificates "for hearing." However, as Sprint and others have explained (see n.13), nothing in Section 214 gives the Commission any jurisdiction over non-controlling investments, and it is unclear whether the Commission has any authority, once a Section 214 certificate has been issued, to alter that certificate. NTIA, in describing the Commission's powers under Section 214, pointedly omits any mention of approvals of less-than-controlling investments (NTIA at 12), and instead characterizes the Commission's Section 214 powers regarding

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[13] See, e.g., Sprint at 7-11; France Telecom at 4-6; and Deutsche Telekom at 5.

[14] See, Deutsche Telekom at 6-8.

consideration of foreign investment in U.S. carriers as limited to situations "amounting to a transfer of control" (id. at 15). Other parties, without discussing the matter in terms of the Commission's statutory authority, urge the Commission to limit application of any reciprocal EMA-type test to cases where there is acquisition of control. See, e.g., AmericaTel at 13, Nynex at 7.

On the other hand, AT&T (at 27-28) and BTNA (at 11-12) urge the Commission go even farther and to require prior approval under Section 214 for less-than-controlling minority investments, without demonstrating that the Commission has jurisdiction to do so. BTNA begs the question by stating (at 11, emphasis added): "If the Commission has the authority to set a carrier's existing Section 214 certificates for hearing to review an affiliation, then the Commission also has the authority to require the filing of a Section 214 application to implement the affiliation." AT&T (id.) merely cites, without explication, Sections 214 and 702 of the Act. The Commission has never invoked Section 214 for such a purpose, and as discussed above, such a requirement would clearly be beyond the scope of that section. As for Section 702, that section (whose relevance was far from self-evident) was recently repealed. Pub.L. 103-414, Section 304(a)(13), October 15, 1994, 108 Stat. 4297.

The only other procedural context discussed in the NPRM for applying an EMA test is in connection with foreign acquisition of more than 25% ownership of a parent of a U.S. radio licensee. See, Section 310(b)(4). However, this section gives the Commission no basis for reviewing ownership interests of less than 25% (proponents of the EMA test would like foreign ownership interests of as little as 5% subject to Commission review and approval[15]), and several parties argue that even in the case of investment interests greater than 25%, a reciprocity test cannot or should not be used, but rather such foreign ownership interests should be routinely accepted. See, British Government, ¶16; Deutsche Telekom at 8-9; Nynex at 6; J. Gregory Sidak at 2-4.

In short, substantial questions have been raised whether the Commission even has the power to consider issues of the openness of foreign markets in exercising its responsibilities under the Communications Act, and at the very least there is no statutory basis for doing so in cases not involving direct foreign entry or foreign acquisition of control of a U.S. carrier.

III. MANY PARTIES CHALLENGE THE EFFICACY OF THE PROPOSED EMA TEST IN OPENING UP FOREIGN MARKETS

Quite apart from whether the Commission has jurisdiction to pursue a reciprocal market entry test as a means to open up

[15] MCI at 12.

foreign markets, there is widespread doubt as to whether such an approach would foster the goal of opening up foreign markets.[16] Many parties applaud the United States for having led by example in encouraging a competitive market structure, and urge the Commission to continue to do so.[17] There are widespread concerns and compelling arguments that the proposed EMA test would be seen as a signal that the U.S. is closing its market, and could provoke retrenchment and retaliation abroad.[18] Some parties suggest that the timing could not be worse for a signal of this sort -- that it is coming just when massive efforts by foreign governments to open their markets are well underway.[19] In this regard, Teleglobe asserts (at 9) that currently there is far more U.S. investment in telecommunications overseas, than foreign investment in U.S. carriers.

The only expert economic analysis of the EMA test in the record casts serious doubt on whether it would be effective and predicted it would make U.S. consumers worse off in some

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[16] There is even some doubt expressed as to the value, to U.S. consumers, of encouraging U.S. carriers to enter the telecommunications market in foreign countries. TLD at 37-38.

[17] See, e.g., British Government at 4, Deutsche Telekom at 36-37, LDDS at 5, Mexico at 12, Teleglobe at 4-5, and TLD at 24.

[18] See, e.g., British Government at 16; Deutsche Telekom at 32-35; Mexico at 3, 11, 13; Nynex at 5; Teleglobe at 5; Telex-Chile at 3.

[19] See, e.g., Mexico at 5-11, Deutsche Telekom at 48-51, France Telecom at 17-19, Teleglobe at 16-20, Citicorp at 3.

circumstances.[20] Several other parties argue that the EMA test is likely to be ineffective for other reasons as well, including the fact that the interests of foreign carriers do not necessarily coincide with those of the foreign governments, that foreign liberalization involves highly complex domestic political and economic considerations, and that the lack of certainty inherent in the Commission's policy -- the Commission's latitude to reject or approve a particular transaction regardless of whether the EMA test is met fully or not satisfied at all -- make it highly improbable that a major change in government policy will take place merely to allow, for example, a minority investment by a foreign carrier in a U.S. carrier.[21] TLD (at 33) puts some of these problems in context through a close-to-home analogy:

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[20] See, "A Game-Theoretic Analysis of the FCC's Proposed Reciprocity Rule," by Stanley M. Bensen and John M. Gale, Charles River Associates, appended to Sprint's Comments as Attachment A.

[21] British Government, ¶¶2, 15, 17; Deutsche Telekom at 28-32; Domtel at 4-5; France Telecom at 8-10; Mexico at 3-4, 13; Teleglobe at 22-25 (Teleglobe also points out (at 7) that in the proposed EMA test, the Commission is asking foreign countries to open up their markets "soon" -- possibly two years or less, but that this process has taken the FCC more than a decade to accomplish and is still incomplete in some respects); and TLD at 28-34.

AT&T (at 2-3) relies on an ex parte letter from C. Fred Bergsten, attached to AT&T's comments, for the proposition that entry into the U.S. market provides an incentive for foreign governments to open up their markets. However, nowhere in his ex parte letter does Dr. Bergsten suggest that this incentive is sufficiently strong that a foreign government is likely to open its markets merely to allow a national carrier to make, e.g., a minority investment in a

> To judge how that bargain [i.e., satisfying the EMA test] looks to most foreign companies, one need only ask whether the lengthy and bitter AT&T antitrust case would have been rendered unnecessary if the European Union had told AT&T that agreeing to the breakup would be treated as "a positive factor" in deciding whether to let AT&T into the European equipment market or whether the RBOCs would abandon their resistance to local competition if the Japanese government said that by doing so they would improve their chances of being allowed to offer services in Japan.

TLD sums up the difficulties of the proposed EMA test with another colorful analogy (at 34): "In short, the proposed rule is about as likely to open foreign markets as burial insurance is to encourage premature death."

Several of the comments also express concerns that the regulatory model in the EMA test looks too much like the U.S. model and does not take sufficient account of legitimately different approaches to regulation that other countries may employ. Similarly, by applying the EMA test narrowly on a service-by-service basis (with primary focus on facilities-based international service) the Commission would ignore how open a foreign country's telecommunications market is overall.[22]

U.S. carrier, or that the U.S. should refuse to allow foreign investment in U.S. carriers in cases where the foreign government does not open its markets.

[22] See, e.g., DGPT at Point 3; France Telecom at 15-17; Mexico at 13; Nynex at 10-12; Teleglobe at 11.

Determining the proper measure of equivalency is clearly not an easy matter. Too narrow a focus clearly would fail to take into account differences in industry structure and regulation that can legitimately vary from one country to the next, and could invite retaliatory actions by the foreign government against U.S. carriers in market segments that would otherwise be open to them. On the other hand, a broad look at equivalency provides little meaningful guidance to a foreign country or carrier and may engender the perception that the U.S. is discriminating as between foreign countries in finding conditions in one set of submarkets sufficient to allow foreign entry into the U.S., but finding conditions in a different set of submarkets in a different country to be insufficient for that purpose.

Some parties propose to inject very tangential factors into consideration of foreign carrier entry into the U.S. carrier market. The Motion Picture Association of America, for one, asks the Commission to examine content restrictions in "the broad range of" the foreign country's "content industries" (MPAA at 4). However, there is no explanation of how the Commission is supposed to weigh what is being shown in, say, Swedish movie theaters against whether to allow a Swedish communications carrier to enter the U.S. market. Obviously this kind of highly problematic exercise would do nothing but foster uncertainty.

At the extreme, AT&T would formulate the EMA test in such rigid terms that in order to permit even a 10% investment by a foreign carrier in a U.S. carrier, or resale by a foreign-controlled carrier, the foreign government would have to eliminate completely the monopoly bottleneck, a test that no country Sprint is aware of, including the U.S., could meet. For example, AT&T (at 31-32) wants the foreign country to have implemented subscriber number portability and dialing parity for all types of calls in order to meet the EMA test. Such conditions do not exist here today and may not for years to come. In addition, AT&T insists (at 36-38) that there be opportunity for U.S. carriers to compete in both domestic and international services in the foreign country, and that actual effective competition must exist before the EMA test can be satisfied. AT&T, in effect, wants the Commission to tell a sovereign foreign government: "You go first, open up your market to a far greater degree than ours is, and then we'll decide whether one of your carriers can make even a small investment in a U.S. carrier." Such a stance is hardly a way to make friends and influence governments.[23] Indeed, it may suit AT&T's objectives to advocate a policy that is doomed to fail, since such a policy would allow AT&T and its global partners to continue filling up the squares on the global game board.

[23] Even BTNA (at 4-7) agrees that AT&T's test goes too far.

Furthermore, adoption of an EMA test by the Commission could provoke other countries into doing the same, and because of the many market segments in the U.S. that remain closed to competition (such as the local service market) or to foreign entry or investment restrictions (any market involving radio licenses), the ability of U.S. carriers to participate in privatization of foreign telephone companies or in cellular, PCS or satellite services could be restricted. As noted above, the U.S. is already heavily involved in investments overseas, and many of these investments could be jeopardized if the Commission provoked foreign governments into adopting their own EMA tests.[24] This would only lead to less market access for U.S. firms and less modernization of telecommunications systems here and abroad, a result that could impact the equipment market as well. Thus, it could well be that the "leverage" provided by an EMA test would work to the detriment, not the benefit, of the U.S. public interest.

Finally, inherent in the Commission's EMA test is the possibility that foreign investment in U.S. carriers -- even non-controlling investments -- would not be permitted. Many parties, however, point out the obvious fact that foreign investment <u>is</u> helpful to the U.S.[25] and that every U.S. carrier

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[24] <u>See</u>, <u>e.g.</u>, Nynex at 10-12.

[25] Sidak states at 3: "[I]t is difficult to hypothesize any legitimate, rational public purpose that would be served by discouraging investment by friendly foreigners in the American telecommunications industry."

smaller than AT&T is in need of additional capital -- including foreign capital -- to improve its competitive position in the U.S. market or to enable it to compete globally. By adopting an EMA approach that only serves to add further uncertainty and delay into the U.S. regulatory process, the Commission would be discouraging, rather than encouraging as it should, such foreign investments.[26] Thus, it is entirely possible that the only result of the proposed EMA policy would be to further advantage AT&T vis-à-vis other U.S. carriers.[27]

IV. THE EMA TEST IS THE WRONG TOOL TO GUARD AGAINST ANTI-COMPETITIVE AND DISCRIMINATORY ACTIONS

In addition to using the EMA test as a means of encouraging foreign governments to open their communications markets to competition, the NPRM also proposed another function for the EMA test: preventing foreign carriers with U.S. carrier affiliates from engaging in anti-competitive or discriminatory actions favoring the U.S. affiliate at the expense of other U.S. carriers. Many other parties agree with Sprint's views (see Sprint's comments at 27-34) that the EMA test is not the

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[26] See, British Government at 4; Communications Telesystems International at 3-4; France Telecom at 19-21; fONOROLA at 8-10; LDDS at 2, 5-6; and TLD at 45-48.

[27] Unless the policy were applied evenhandedly, i.e., by reopening the Commission's approval of BT/MCI alliance because of the U.K.'s continuing refusal to allow facilities-based international competition -- the policy would also have the effect of favoring the second largest U.S. carrier over smaller rivals.

best way to approach this problem, either. In addition to the legal infirmities of attempting to use Section 214 to control carrier practices, especially in situations that do not involve acquisition of facilities or a change in control (or, depending on the threshold selected for triggering Commission application of the EMA test, using Section 310(b) where foreign ownership interests are less than 25%), the use of a test that is focused on foreign carrier entry or investment does not deal directly with discriminatory conduct and fails to take account of the equal or even greater opportunities for discriminatory, anti-competitive actions by foreign carriers where no entry or investment in a U.S. carrier is involved. Thus, many parties argue that the non-discrimination protections should be applied where a U.S. carrier invests in a foreign carrier, or where the U.S. carrier and foreign carrier have other substantial business relationships that do not necessarily include investment in one another, such as co-marketing agreements, partnership interests in third entities and the like.[28] Even MCI, which is largely supportive of the Commission's EMA proposal, concedes that other U.S.-foreign carrier relationships pose the same potential for discrimination (MCI at 13-15).

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[28] See, AmericaTel at 11-13; LDDS at 7; MFS International at 3-10; Nynex at 12-13; Teleglobe at 31; TLD at 52-60.

If the Commission is concerned about possible anti-competitive and discriminatory actions by foreign carriers, there is no reason to confine that concern only to one particular type of business arrangement -- equity investment by the foreign carrier in the U.S. carrier -- and to ignore the other forms of business relationships which can give rise to the same of conduct. The way to address this concern is through adoption of industry-wide rules of general applicability, based upon the conditions on which the Commission employed in BT/MCI,[29] rather than to engage in a questionable use of the Commission's powers under Sections 214 and 310. Adopting rules of general applicability would also avoid the unfairness that could result from applying different safeguards to different carriers, simply because their transactions came before the Commission at different times.

V. THE COMMISSION SHOULD ABANDON THE PROPOSED EMA TEST

Despite its continued belief that the Commission's ultimate policy goals are laudable, Sprint believes that the overwhelming weight of the evidence and argument in the initial comments demonstrates that the EMA test is open to serious challenge on jurisdictional and legal grounds, and to serious question as to whether it will be likely to have any benefi-

[29] 9 FCC Rcd 3960 (1994). Sprint is not aware of any serious challenge to the sufficiency of these conditions.